No. 91-545

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIRMAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C. COBELL, TREASURER

and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; KENNETH E. RYAN, TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/ ACCOUNTANT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S SUPPLEMENTAL BRIEF

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RULE 29.1 STATEMENT

Burlington Northern, Inc. is the parent company of Petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of Petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
M T Properties, Inc.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
TTX Company
The Wichita Union Terminal Railway Company

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PETITIONER'S SUPPLEMENTAL BRIEF

On December 2, 1991, this Court invited the United States to express its views as to whether review should be granted in this case. Six months later, the United States submitted a 21-page presentation of the position of the United States and its constituencies with respect to the merits. It is not a reasoned assessment of the cert-worthiness of the Petition. It should not dissuade this Court from granting review with respect to the important, difficult questions raised by this case.

Significantly, the brief submitted by the United States makes no effort to diminish the importance of the questions presented here. It tacitly accepts the many points made in the Petition and supporting briefs concerning the Ninth Circuit's decision:

- that the Ninth Circuit encompasses the majority of the Indian reservations in the country, and hence plays a pivotal role in the development of Indian law;
- that the nation's railroads have been subjected to tribal taxes in a variety of jurisdictions and have vast networks of track vulnerable to heavy tribal taxation;
- that a range of other utilities—including gas and oil pipelines, telephone lines, electricity lines—are now targets of tribal tax schemes, even though these utilities may cross tribal lands primarily to serve persons who are not members of the tribes and who do not even live within the boundaries of the reservation;
- that questions relating to the scope of tribal sovereignty over nonmembers are generating increasing tensions between Indians and non-Indians in the western states, and raising serious fiscal, regulatory and political problems for state governments.

The United States does not dispute these and the other points made in the original briefs with respect to the widespread ramifications of the decision below. In fact, the United States does not minimize the potential for excessive and discriminatory tribal taxation of nonmembers.[1] Thus, it is plain that the Petition presents issues of both real-life importance and national scope.

Rather than assessing the importance of the issues, the United States advocates a territorial theory of tribal sovereignty that assertedly controls the merits.[2] This is

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[1] The United States would refer the problem of tribal taxation to Congress, even though it is a problem of judicial creation and a problem generated in part by doctrinal positions advocated by the United States.

[2] This territorial theory seems to rest on tiny snippets clipped from opinions identifying a "geographical component to tribal sovereignty." *See, e.g.*, Brief for the United States at 8, 14 (quoting

not the first time that the United States has attempted to persuade this Court that the scope of tribal sovereignty over nonmembers should turn on one territorial boundary or another. Each time, this Court has rejected that view.

For example, in *Oliphant* the United States asserted that tribal sovereignty is virtually absolute within "the confines of a reservation where Indians maintain tribal relations." Brief for the United States as *Amicus Curiae* at 14, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729). The United States argued that, because "tribal jurisdiction is essentially *territorial*," *id.* at 15, it extends to all who enter the reservation, including non-Indians. "And this is so even though the conduct occurs on non-Indian land within a reservation." *Id.* at 15-16. Under the United States' view of tribal sovereignty, the status of nonmembers within the reservation "is no different from the situation of anyone residing in a foreign country." *Id.* at 45. This Court decisively rejected that view in *Oliphant*. *See* 435 U.S. at 208-09.

In *Montana*, this Court granted certiorari over the opposition of the United States, which had argued that the Ninth Circuit's decision created no conflicts and that there was no "call for review by this Court." Brief for the United States in Opposition at 8, *Montana v. United States*, 450 U.S. 544 (1981) (No. 79-1128). There the United States argued that the Crow Tribe should be

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White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 151 (1980)). These opinions deal with different subjects, and emphasize, in any event, that "there is no rigid rule" and that "the reservation boundary is not absolute." 448 U.S. at 142, 151.

The reliance of the United States on a territorial theory advanced in a decision dealing with state taxes is particularly puzzling when its brief fails to address the prior decisions of this Court holding that, for purposes of such state taxes, the railway rights of way granted by Congress "were taken out of the reservation by virtue of the grant" and are therefore subject to state tax. *See* Pet. Reply at 4 (quoting *Maricopa & P. R.R. v. Arizona*, 156 U.S. 347, 352 (1895)).

permitted to regulate the conduct of nonmembers within reservation boundaries, because *Oliphant* "holds only that Indian tribes cannot assert criminal jurisdiction over non-Indians." *Id.* at 13. The Court declined to accept this distinction and stated explicitly that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565.

In *Duro*, the United States again likened the status of a nonmember within reservation boundaries to that of a resident alien of a foreign country, "who must comply with the foreign country's criminal laws and subject himself to the jurisdiction of its courts, even though he cannot participate in its political processes." Brief for the United States as *Amicus Curiae* Supporting Respondents at 28, *Duro v. Reino*, 495 U.S. 676 (1990) (No. 88-6546). This Court again rejected the argument: "A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense." *Duro*, 495 U.S. at 685.

This history indicates that the United States, as trustee for the tribes, has often championed a broad geographic view of tribal sovereignty. Employing that perspective, the United States finds the decision below desirable and urges this Court to leave it in place. But the position asserted by the United States has not been adopted by this Court. Before it becomes controlling law in the circuit whose decisions govern most tribal/nontribal relations in this country, it should be subjected to full briefing, argument and analysis.

In fact, the decisions of *this* Court suggest that simple geography does not alone control sensitive decisions with respect to the scope of tribal sovereignty over nonmembers. For example, in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980),

this Court referred to "the power to tax transactions occurring on trust lands *and significantly involving a tribe or its members.*" It did not suggest that *all* activities occurring on trust lands were subject to a sovereign tribal power to tax, and it did not even address a situation in which, as here, the tribe lacked a power to exclude the nonmembers sought to be taxed. To the contrary, as the United States acknowledges, *Colville* recognized taxing power over nonmembers "so far as such nonmembers may accept privileges of trade, residence, etc., *to which taxes may be attached as conditions.*" Brief for the United States at 8 (quoting 447 U.S. at 153) (emphasis added).[3]

The trust lands/fee lands distinction on which the United States relies is purportedly derived from this Court's decision in *Montana*.[4] But the Court did not there state a different rule for trust lands. It simply did not need to analyze the regulation of fishing and hunting on trust lands, because it agreed with the decision of the lower court upholding the application of the tribe's regulations to nonmembers on trust lands as a condition of its power to exclude them. *See Montana*, 450 U.S. at 557,

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[3] As the United States acknowledges, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court was again faced with direct commercial dealings with a tribe, and therefore "relied to a significant extent on its earlier decision in *Colville*." Brief for the United States at 9.

[4] From the perspective of railroads and other utilities following a fixed route across the reservation, the trust lands/fee lands distinction is largely abstract. If the railroad crosses a portion of the trust lands at any point, the tribe will have an opportunity to exact a heavy tax. The illusory nature of the distinction is further illustrated by the fact that tribes are now considering *buying* fee lands adjacent to utilities and converting them into trust lands, in order to gain the right to impose a tax. *See* "Tribes May Buy Land to Collect More Taxes," *Billings Gazette* (Nov. 15, 1991) (Eastern Montana Edition) (Fort Peck and Assiniboine Tribes considered buying fee land bordering on the Northern Border pipeline so as to impose taxes).

aff'g in part, 604 F.2d 1162 (9th Cir. 1979).[5] In the absence of that power, if there is any authority over nonmembers at all, it must rest on the analysis presented by this Court in *Montana*, which relies on the existence of a consensual relationship.[6]

Admitting that a consensual relationship is "one form" of "significant involvement" under *Colville*, the United States asserts that there could be others. The United States does not describe, however, any other form of such involvement nor does it identify the decisions of this Court in which such nonconsensual relationships have been found adequate for tribal taxation or regulation of nonmembers.[7]

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[5] The United States is mistaken in suggesting that the taxpayers in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), were subject to the same restraints on their ability to quit the reservation as are the railroads. *See* Brief for the United States at 17 n.15. The regulation upon which the United States relies, 25 C.F.R. § 211.27, permits mineral lessees "to surrender a lease or any part of it" upon satisfaction of certain conditions essentially relating to the payment of outstanding rents and royalties and the conservation of the leased property. Railroads, on the other hand, are prohibited from abandoning a line unless they are able to convince the Interstate Commerce Commission that the abandonment is "consistent with public necessity and convenience." *Colorado v. United States*, 271 U.S. 153, 168 (1926); *see* 49 U.S.C. § 10903. No comparable substantive standard applies to the cancellation of tribal mineral leases.

[6] Contrary to the Brief for the United States (at 9), the Court in *Merrion* did not dispense with the need for a consensual business relationship as a predicate for tribal taxation of nonmembers. Rather, it rejected the claim that a tax must be *specifically authorized* in the commercial agreement between the tribe and the outside entity before it may be imposed. Thus, *Merrion* exemplifies a situation in which taxes were upheld because nonmembers had "enter[ed] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Montana*, 450 U.S. at 565.

[7] Contrary to the Brief for the United States (at 10 n.9), Petitioner has timely and firmly argued for the requirement of a consensual relationship. For example, in its Reply Brief in the Court

The United States argues, in the alternative, that the railroad *has* a consensual relationship with the tribes, because it received its statutory rights of way from the United States "which was acting in its capacity as a trustee for the Tribes when it granted the rights of way." Brief for the United States at 16. This assertion is unsupported and is doubtful as a matter of history. But even assuming its validity, the government's reasoning proves too much. For the fee lands now possessed by nonmembers were also granted by the United States, presumably in the same capacity. If this attenuated connection through the United States constituted the kind of consensual relationship contemplated by this Court in *Montana*, then the tribes would have plenary power to tax and regulate all nonmembers on fee lands—a view this Court has already rejected in *Montana* itself and in *Brendale*. Thus, the "third-party" theory of consensual relationship on which the United States and the court below have relied is both wrong and dangerous. It provides further reason to re-examine the decision below.

Finally, the United States relies on a static concept of tribal sovereignty—one which freezes the views expressed,

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of Appeals, Petitioner emphasized "the critical importance of this missing element":

> [I]n every case cited by the Tribes in support of the Tribal power to tax, the entity being taxed had entered into some type of consensual relationship with the tribe, either through leases, or by engaging in other commercial activities involving the tribe or tribal members. . . . Here, however, this basic feature is absent, and its absence, in and of itself, distinguishes this case from all other cases cited by the Tribes in support of their general power to tax non-Indians.
>
> . . . .
>
> Here, because of the absence of this consensual relationship, it is clear that the railroad is not within the class of non-Indians identified in *Montana* over whom the Tribe can exercise its taxing power.

88-4428 Pet. C.A. Reply Br. at 12-14.

often in dicta, in the opinion in *Merrion*.[8] This Court has provided new guidance in cases such as *Duro* and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), which receive little or no attention in the brief of the United States. In *Duro*—which the United States does not even cite—this Court emphasized consent as the basis for tribal jurisdiction over nonmembers. *See* 495 U.S. at 694. In *Brendale*, the plurality opinion by Justice White relied on the absence of a consensual relationship, even though the fee owners would undoubtedly enjoy many benefits from the tribal zoning plan. *See* 492 U.S. at 428. Justices Stevens and O'Connor continued to derive tribal power over nonmembers solely from the power to exclude. *See Brendale*, 492 U.S. at 433-37 (Stevens, J., concurring).[9]

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[8] *Merrion*'s broad language has also misled the lower courts, which have indicated that they view this Court's tribal taxing cases as establishing an entirely separate branch of sovereignty jurisprudence. *See* Pet. at 10-11 & n.8. Thus, these courts have concluded that the power to tax is essentially an unlimited attribute of tribal sovereignty, which may be applied to *all* businesses located within reservation boundaries. For example, even railroad cars passing through the reservation have been held subject to an ad valorem tax. *See In re Protest Filed by Railbox Co.*, Nos. CV-87-54, 55 & 56, Pueblo of Acoma Tribal Court (Mar. 19, 1990), *aff'd*, Pueblo of Acoma Tribal Counsel (Dec. 14, 1990). Taxes have also been imposed on non-Indian businesses, presumably located on fee lands. *See Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). The United States now acknowledges that tribal tax laws should be analyzed under the same framework as "other types of civil law adopted by a tribe," Brief for the United States at 7, but it does not explain how these lower court cases can be reconciled with that principle. *See id.* at 15 n.11.

[9] The United States asserts (Brief at 15 n.10) that this Court cannot consider the absence of any power to exclude because Petitioner did not raise it in the court of appeals. To the contrary, Petitioner argued in its Reply Brief below that the Tribes lacked the normal attributes of sovereignty over BN because "[t]he Tribes have conceded they have no power to exclude the railroad from the reservation." 88-4429, Pet. C.A. Reply Br. at 17.

Petitioner did not refer to the opinion of Justice Stevens in *Brendale*, because that case had not been decided at the time the

Clearly, these emerging, divergent views must be reconciled in order to provide definitive guidance for citizens, businesses, states and tribes who continue to struggle with fiscal and tax problems in tribal/nontribal relations.[10] This case, with its well-defined facts and broad economic ramifications, provides an appropriate vehicle for that purpose. The United States has said nothing that detracts from that central point.

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briefs were submitted. However, in its petition for rehearing in the court of appeals, Petitioner pointed out that, in *Brendale*, Justice Stevens, joined by Justice O'Connor, had relied solely on the power to exclude. Petitioner reasoned, "The Tribes clearly have no power to exclude BN from their reservations. . . . Thus, here, as in *Brendale*, the Tribes cannot rely upon their general power to exclude non-members as support for their taxing efforts." C.A. Pet. for Rehearing at 10 & n.1.

[10] The Blackfeet Tribe has recently proposed new taxes on the distribution of gasoline and the provision of lodging that will apply to trust and fee land alike and to sales by nonmembers to other nonmembers. Proposed Blackfeet Gasoline Tax Ordinance, *to be codified at* Blackfeet Comprehensive Tax Code Ch. 6; Proposed Blackfeet Lodging Tax Ordinance, *to be codified at* Blackfeet Comprehensive Tax Code Ch. 7.

At the same time, litigation continues to spread. For example, *amicus* Reservation Telephone Cooperative has recently instituted a declaratory judgment action against the Three Affiliated Tribes of the Fort Berthold Reservation challenging those tribes' authority to impose a tax on the Cooperative's rights of way on both trust and fee lands in the absence of either a consensual relationship or a nexus between the tax and the activities sought to be taxed. *Reservation Telephone Cooperative v. Three Affiliated Tribes*, No. A1-92-111 (D.N.D. filed May 28, 1992).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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